

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6144

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

B

P/S

-----X
WAN SHIH HSIEH,

Appellant,

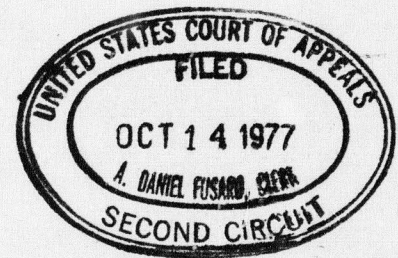
- v -

MAURICE F. KILEY, District Director,
IMMIGRATION AND NATURALIZATION SERVICE,
UNITED STATES DEPARTMENT OF JUSTICE,

Appellees.
-----X

Docket No. 77-6144

BRIEF OF APPELLANT WAN SHIH HSIEH



LAW OFFICES OF DAVID C. BUXBAUM, P.C.
Attorneys for Appellant

11 Broadway, Suite 1612
New York, New York 10004
(212) 425-4347

TABLE OF CONTENTS

	<u>Page</u>
I. PRELIMINARY STATEMENT	1
II. FACTS	2
III. ISSUES	6
IV. ARGUMENT	7
A. Summary Judgment for Appellant Should Have Been Granted Since the Immigration and Naturalization Service Blatantly Abused Its Authority By Failing To Exercise It in Taking Over Two Years (To Date) To Complete Its Investigation, Keeping Appellant From Seeing Her Children For Years By Failing To Place a Telephone Call.	7
1. The Material Facts of This Claim Are Not in Dispute.	7
2. In Considering Whether Passage of Time in An Administrative Context is Unreasonable--Two Factors Must Be Balanced. The Administrative Justification for the Delay and the Harm To the Party Resulting from the Delay.	8
a. Administrative justification is not persuasive.	8
(1) Appellees have violated the clear statutory purpose of the Immigration and Nationality Act. . . .	10
(2) Appellant has been denied due process.	11
(3) Low priority does not explain why simple investigation has taken over two years to complete. . .	12

	<u>Page</u>
(4) Appellees wrongly classified appellant's case.	14
b. Appellees' delay is causing appellant great harm.	15
B. The District Court Had the Authority to Compel the Appellees to Respond to the Consul in Taiwan.	16
1. This case does not involve a Consular Officer's decision to grant or deny a visa.	16
2. All the requisites necessary for a writ of mandamus are present.	17
a. Appellees have a duty to appellant to complete the investigation.	17
b. Appellant has no other adequate remedy available.	18
c. Appellant does not seek to compel appellees to decide in a specified manner.	18
d. Appellant is entitled to the relief sought.	19
C. District Court Erred in Granting Summary Judgment To Appellees As Material Facts Are In Dispute.	21
1. Appellant disputes the existence of the alleged "low priority" status.	22
a. The requirements of Rule 56 of the Federal Rules of Civil Procedure have been ignored.	22
b. Nowhere on the record is there a definition of "low priority".	24

	<u>Page</u>
c. The willful delays by Investigator Diane M. Weisheit raise a clear inference of bad faith which the district court totally <u>ignored</u>	25
2. Dispute exists as to the proper classification of appellant's case.	27
3. Other factual issues in dispute could not be determined on the sparse record before the district court judge.	28
a. Dispute exists as to whether or not appellant made misrepresentation in obtaining her permanent resident alien status.	28
b. Dispute exists as to who caused the delays in the investigation.	29
c. Dispute exists as to whether appellees informed appellant of the reason for the interview of August 25, 1976.	30
d. Dispute exists as to statements of appellant at the interview on August 25, 1976.	30
e. Dispute exists as to the reason for terminating the interview of August 25, 1976.	30
4. The instant case is distinguishable from other cases where summary judgment was granted.	31
V. CONCLUSION	33

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases Cited:</u>	
<u>Barber v. Tadaysu Abo</u> , 186 F.2d 775 (9th Cir. 1951), cert den. 342 U.S. 832 (1951)	23
<u>Carino v. INS</u> , 460 F.2d 1341 (7th Cir. 1972)	14
<u>Chong Shik Ahn v. District Director of U.S. I.N.S.</u> , 418 F.2d 910 (9th Cir. 1969)	31
<u>Feliciano v. Laird</u> , 426 F.2d 424 (2d Cir. 1970)	17, 19, 20
<u>Fiallo v. Bell</u> , 97 S.Ct. 1473 (1977)	10, 11
<u>Fiallo v. Levi</u> , 406 F.Supp. 162 (E.D.N.Y. 1975), aff'd. <u>Fiallo v. Bell</u> , 97 S.Ct. 1473 (1977).	10, 11
<u>Gagnon v. Scarpelli</u> , 411 U.S. 778 (1972)	26
<u>Gomez v. Kissinger</u> , 534 F.2d 518 (2d Cir. 1976), U.S. cert. den.	16
<u>Graham v. Richardson</u> , 403 U.S. 365 (1971)	11
<u>Guinto v. Rosenberg</u> , 446 F.2d 11 (9th Cir. 1971)	14
<u>Haidar v. Coomey</u> , 401 F.Supp. 717 (D.Mass. 1974), app. den. 530 F.2d 962 (1st Cir. 1976)	20
<u>Hampton v. Mow Sun Wong</u> , 426 U.S. 88 (1976)	9
<u>Haneke v. Secretary of Health, Ed. and Welfare</u> , 535 F.2d 1291 (D.C. Cir. 1976)	18
<u>Immigration Service v. Errico</u> , 385 U.S. 214 (1968)	10
<u>Leonhard v. Mitchell</u> , 473 F.2d 709 (2d Cir. 1973), cert. den. sub nom. <u>Leonhard v. Richardson</u> , 412 U.S. 949 (1973)	20
<u>Levy v. Louisiana</u> , 391 U.S. 68 (1968)	11

	<u>Page</u>
<u>Lovallo v. Froehlke</u> , 468 F.2d 340 (2d Cir. 1972), cert. den. 411 U.S. 918 (1973)	17, 19, 21
<u>Mamengo v. I.N.S.</u> , 446 F.2d 51 (9th Cir. 1971)	18
<u>Martin v. Dunlop</u> , 411 F.Supp. 519 (N.D. Cal. 1976)	17
<u>May v. Anderson</u> , 345 U.S. 528 (1953)	11
<u>McLat v. Longo</u> , 412 F.Supp. 1021 (D.C. Virgin Islands 1966) .	18
<u>Meyer v. Nebraska</u> , 262 U.S. 340 (1923)	11
<u>Moore v. Arizona</u> , 414 U.S. 25 (1974)	16
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1971)	26
<u>Nazareno v. Attorney General of U.S.</u> , 366 F.Supp. 1219 (D.C.D.C. 1973), aff'd 512 F.2d 936, cert. den. 423 U.S. 832 (1973)	18
<u>Nixon v. Secretary of the Navy</u> , 422 F.2d 934 (2d Cir. 1970) .	19
<u>Pena v. Kissinger</u> , 409 F.Supp. 1182 (S.D.N.Y. 1976)	11, 15, 16, 18
<u>Poller v. Columbia Broadcasting System</u> , 368 U.S. 464 (1962) .	21, 28
<u>Sartor v. Arkansas National Gas Corp.</u> , 321 U.S. 620 (1944) . .	22
<u>Skinner v. Oklahoma</u> , 316 U.S. 535 (1942)	11
<u>Small v. Kiley</u> , Docket No. 76-6162, Slip Opinion, p. 2221 (2d Cir. decided March 9, 1977).	13
<u>Stanley v. Illinois</u> , 405 U.S. 645 (1975)	11
<u>Tang v. District Director of U.S., I.N.S.</u> , 298 F.Supp. 413 (D.C. Cal. 1969), aff'd 433 F.2d 1311 (9th Cir. 1970)	31
<u>United States ex rel. Schonbrun v. Commanding Officer, Armed Forces</u> , 403 F.2d 371 (2d Cir. 1968), cert. den. 394 U.S. 929 (1968)	19

	<u>Page</u>
<u>Weber v. Aetna Casualty and Surety Co.</u> , 406 U.S. 164 (1972)	11
<u>Weinberger v. Salfli</u> , 422 U.S. 749 (1975)	11
 <u>Statutes Cited:</u>	
8 U.S.C. § 1101(b)(1)D	11
8 U.S.C. § 1101(b)(2)	11
8 U.S.C. § 1153(a)(2)	11
8 U.S.C. § 1153(a)(6)	8, 15
28 U.S.C. § 1361	16, 17, 19
 <u>Regulations Cited:</u>	
8 C.F.R. § 205.3	19
 <u>Federal Rules cited:</u>	
Federal Rule of Civil Procedure 56(c)	21
Federal Rule of Civil Procedure 56(e)	22
Federal Rule of Evidence 801	23
 <u>Legislative History cited:</u>	
H.R. Rep. No. 1365, 82nd Cong, 2nd Sess. 29 (1952)	10
H.R. Rep. No. 1199, 85th Cong., 1st Sess., p. 7 (1957) . .	10
103 Cong. Rec. 15497 (1957) (remarks of Senator Patore) . .	10

	<u>Page</u>
Goldman, <u>Administrative Delay and Judicial Relief</u> , 66 <u>Michigan Law Review</u> 1423 (1968)	9
Note, <u>Developments in the Law: Remedies Against the United States and Its Officials</u> , 70 <u>Harv. L. Rev.</u> 827 (1957)	19

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

- - - - -x
WAN SHIH HSIEH, :
Appellant, : Docket No. 77-6144
- v - :
MAURICE F. KILEY, District Director, :
IMMIGRATION AND NATURALIZATION SERVICE, :
UNITED STATES DEPARTMENT OF JUSTICE, :
Appellees. :
- - - - -x

BRIEF OF APPELLANT WAN SHIH HSIEH

I. PRELIMINARY STATEMENT

Appellant, Wan Shih Hsieh (hereinafter, "appellant"), appeals from a memorandum decision and order of the United States District Court for the Southern District of New York (Lloyd MacMahon, D.J.), denying appellant's motion for summary judgment and granting appellees' motion for summary judgment.

II. FACTS

The present controversy stems from the efforts of appellant, a resident alien, to have immigrant visas issued to her three children who reside in Taiwan, Republic of China. (A. 54)

Appellant left her husband and three children in Taiwan upon coming to the United States on September 20, 1966. (A. 54-55). The separation of appellant from her children, termed "serious prejudice" (A. 63), was felt all the more forcefully by the death of her husband, which left her children without parental care.

On November 9, 1973, she adjusted her status to that of permanent resident alien in part on the approval of a petition granting her sixth preference status pursuant to § 203(a)(6) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(a)(6), which confers priority in the allocation of immigrant visas on qualified immigrants who are capable of performing specified types of labor for which a shortage of persons exists within the United States. (A. 55).

Appellant obtained the employment preference based on her previous employment as a Chinese cook for six years in Taiwan. (A. 35). She also worked as a pedicab driver during this period. (A. 35).

Immediately upon being granted permanent resident status, she petitioned on behalf of her children for permanent resident status, pursuant to 8 U.S.C. § 1153(a)(2) which confers priority upon unmarried children of lawfully admitted resident aliens in the allocation of immigration visas implementing strong Congressional purpose to reunite families. (A. 55).

On April, 1975, the Immigration and Naturalization Service (hereinafter, "INS") approved the petition, and the children applied to the United States Consulate in Taiwan for immigration visas on July 15, 1975. (A. 55-56).

In the district court's own language, "Although INS received the Consul's request in September 1975, the matter was not assigned for investigation until May, 1976." (A. 56). There is nothing on the record to indicate any reason for this initial eight month delay.

Appellant sent two letters of inquiry to INS concerning her children's visa applications (A. 56) during this eight month period.

On August 25, 1976, eleven months after the INS received the request to investigate the matter to facilitate the reuniting of appellant with her children, during which interim appellant's husband died in Taiwan, an interview was arranged by an employee of the "Frauds" unit of the New York office of the INS, an employee of one year's duration as of the date of that interview. (A. 56, A. 2-28).

The alleged purpose of the interview was to investigate whether appellant had just been a pedicab driver or had also been a Chinese Cook while in Taiwan, factors upon which her own status had been obtained. (A. 56).

The employee in question, Dianne M. Weisheit, unilaterally decided to terminate the interview (A. 56) due to alleged disruptive influence of plaintiff's attorney (The transcripts revealed appellant's attorney speaks fluent Chinese and had sought to refine the translations being given his client's answers) (A. 56).

The employee then terminated all action with respect to the case, save for an interview on September 2, 1976, for a period of nine months, in response to what she perceived as appellant's attorney's improper conduct. (See, A. 4-28, A. 56).

On August 27, 1976, appellant sought a writ of mandamus, pursuant to U.S.C. 1361, ordering the INS to exercise its discretion with respect to the investigation and furnish the consul in Taiwan with the required report. (A. 1-3).

Predictably, the district court found Dianne M. Weisheit's statements as to the policies of the entire INS as evidence of "purported" priorities (A. 63), although it was her position in the only affidavit submitted to the court of substance in support of its motion for summary judgment, that what the district court had termed "purported" priorities was her only reason for the delay to date. (A. 62).

The Court found: "Defendant (Dianne M. Weisheit) purportedly assigns lower priority to investigation requests" like that of appellant's. (A. 63). The lower court thus equated the statements of the employee in question with competent evidence of the policy of the INS, although no such evidence was put before the court by any official of appellee.

The district court thus found that the factor of what "priority" status appellant's case falls into was in dispute. (A. 63).

Nowhere on the record is the phrase "lower priority" explicated or related to a class of cases which have higher priority save a distinction based on the residence of the applicant which was apparently ignored in appellant's case. (A. 63). The court found that the statement of Ms. Weisheit was based upon her self-professed policy of distinguishing between aliens who apply while in the United States and those that apply while abroad. (A. 63). The court failed to mention that under the scheme of priorities sworn to by Ms. Weisheit appellant should have been afforded the higher priority.

The lower court granted summary judgment to appellee and denied appellant's motion for summary judgment.

It has now been over two years since appellees received the Consul's request to verify the statements of appellant and over one year and four months since Ms. Weisheit unilaterally formulated a policy of shelving the investigation due to her perception of appellant's attorney as being intrusive upon her administrative domain. Two phone calls could have reunited appellant with her children, calls which could have been placed two years ago. To this day, appellees have failed to dial the numbers to end this appellate embroilment.

III. ISSUES

1. WHETHER THE INS, BY FAILING TO COMPLETE ITS INVESTIGATION WITHIN TWO YEARS, THEREBY KEEPING APPELLANT FROM SEEING HER CHILDREN, ABUSED ITS AUTHORITY SO THAT SUMMARY JUDGMENT FOR APPELLANT SHOULD HAVE BEEN GRANTED.

2. WHETHER THE DISTRICT COURT HAS AUTHORITY TO COMPEL THE INS TO RESPOND TO THE INQUIRIES MADE BY THE CONSUL IN TAIWAN.

3. WHETHER THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES WHEN THE FACTS ALLEGED BY APPELLEES WERE IN DISPUTE.

IV. ARGUMENT

- A. Summary Judgment for Appellant Should Have Been Granted Since the Immigration and Naturalization Service Blatantly Abused Its Authority By Failing To Exercise It in Taking Over Two Years (To Date) To Complete Its Investigation, Keeping Appellant From Seeing Her Children For Years By Failing To Place a Telephone Call.
-

1. The Material Facts of This Claim Are Not in Dispute.

The facts pertinent to this claim are very simple indeed:

(1) appellees owe a duty to appellant to undertake and complete the investigation concerning her alleged fraudulent misrepresentations (A. 58-64); (2) the alleged investigation has been "proceeding" for over two years; (3) appellees have yet to report their findings to the Taiwan Consul; and (4) due to appellees' delay, appellant is being kept needlessly separated from her three children. Simply stated, appellees have been cruelly derelict in their duty to appellant for years.

The chief question presented is whether this dereliction of duty by appellees is an abuse of authority entitling her to summary judgment. Abuse of authority should be carefully distinguished from abuse of discretion. Appellees had no choice in this matter; they were obligated to conduct this investigation (A. 58-64). This is not an action challenging a decision by appellees. Obviously, no decision has been made to date. Consequently, all cases dealing with judicial review of discretionary decisions (e.g., denying preferences or visas) by the Immigration and Naturalization Service are not pertinent to the instant case.

The presence or absence of fraud by appellant is also immaterial to appellees' duty to investigate. If there was no fraud then appellees have certainly abused their authority. But even if there were fraud (which appellant vehemently denies), appellees have abused their authority by abdicating their responsibilities for years while keeping appellant in administrative "limbo".

In summary, all that is relevant with regard to appellant's claim for summary judgment is the incredible length of time that has elapsed while appellees were supposedly investigating appellant's case, during which time her three children have been deprived of their mother, a permanent resident alien.

2. In Considering Whether Passage of Time in An Administrative Context is Unreasonable--
Two Factors Must Be Balanced. The Administrative Justification for the Delay and the Harm To the Party Resulting from the Delay.

That there has been a delay in this case is indisputable as for over two years now appellant, her three children, and the Taiwan Consul have been awaiting a decision by appellees. No decision has been forthcoming. As a result, no action has been taken on appellant's children's applications for immigration visas, preventing appellant's family from being reunited. Whether or not this delay is so unreasonable as to be an abuse of authority by appellees is the question before this Court.

- a. Administrative justification is not persuasive.

The fact of a two year delay establishes abuse of authority. Although "a given instance of administrative delay may or may not be

defensible",* in this specific instance the two year delay is indefensible and a clear abuse of authority.

The standard to be used in determining the unreasonableness of an administrative delay is a flexible one laying heavy emphasis on "the administrative justification for the delay and the [corresponding] harm to the party resulting from the delay." Id.

In the instant case, the balance is clearly in favor of appellant, and as such, summary judgment should have been granted to her.

Having offered no competent evidence of the so-called "low priority" status of appellant's case category (see, C, infra), the court below thus conjured a justification for what it styled as "Defendant['s] "purported. . .lower priority", (A. 66), which itself is nonsensical, arbitrary, and capricious, and which, even if accepted, was clearly not even colorably applied to appellant's case but was wholly ignored!

The court below stated that applications submitted to foreign consuls are a "purported low priority" (A. 63) compared to those submitted on behalf of aliens within the United States, a distinction wholly irrational and raising questions of constitutional dimension. See, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). The court then totally ignored the simple fact that appellant is in the United States!

* Goldman, Administrative Delay and Judicial Review, 66 Michigan Law Review 1423, 1449 (1968).

- (1) Appellees have violated the clear statutory purpose of the Immigration and Nationality Act.

"The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." H.R. Rep. No. 1199, 85th Congress, 1st Sess., p. 7 (1957). See also, H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 29 (1952), U.S. Code Cong. and Admin. News 1952, pp. 1653, 1680 (statute implements "the underlying intention of our immigration laws regarding the preservation of the family unit."); 103 Cong. Rec. 15497 (1957) (remarks of Senator Pature) ("This bill is praiseworthy in its fundamental purpose--to reunite families."); Immigration Service v. Errico, 385 U.S. 214, 220 (1966) ("The intent of the Act is plainly to. . .[keep] family units together."); Fiallo v. Levi, 406 F.Supp. 162, 171 (E.D.N.Y. 1975) (dissenting opinion) ("The legislative history and the statutory scheme leave no doubt that the exclusive purpose of Congress was to maintain or reunite family units which include United States citizen or permanent resident members. . ."); Fiallo v. Bell, 97 S.Ct. 1473, n. 6 (1977). (emphasis supplied).

"To accommodate this goal Congress has accorded a special 'preference status' to certain aliens who share relationships with citizens or permanent resident aliens." Fiallo v. Bell, 97 S.Ct. 1473, n. 6 (1977) (emphasis supplied).

Appellee's action--or more appropriately, inaction--in the instant case, flies directly in the face of this perfectly clear congressional policy and frustrates its achievement by keeping appellant's family from being reunited. It is difficult to conceive of a clearer or more damaging abuse of authority.

(2) Appellant has been denied due process.

As a lawfully admitted permanent resident alien, appellant is "entitled to the full panoply of constitutional protection," Pena v. Kissinger, 409 F.Supp. 1182, 1187 (S.D.N.Y. 1976), citing Graham v. Richardson, 403 U.S. 365 (1971). "[I]t is firmly established that a natural parent. . .and a child. . .have fundamental, constitutionally protected interests in mutual companionship and a life together", Fiallo v. Levi, 406 F.Supp. 162, 171 (E.D.N.Y. 1975) (dissenting opinion), aff'd. Fiallo v. Bell, 97 S.Ct. 1473 (1977). To allow appellees to delay for this incredible amount of time is to allow an infringement of one of appellant's most sacred constitutional rights.

"The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626 67 L.Ed. 1042 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and '[r]ights far more precious. . .than property rights,' May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953)." Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). See also, Weinberger v. Salafi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).*

* The holding of Fiallo v. Bell, 97 S.Ct. 1473 (1977), that the classification of 8 U.S.C. § 1101(b)(1)(D) and 1101(b)(2) "are not unconstitutional by virtue of the exclusion of the relationship between an illegitimate child and his

In the instant case, plaintiff clearly has the right, under 8 U.S.C. § 1153 to have a decision made regarding her children entering the United States. Stalling by the appellees with but the frailest excuse bearing no relationship to the simple practicality of placing a telephone call or writing a letter, denies her that right without any semblance of due process of law.

- (3) Low priority does not explain why simple investigation has taken over two years to complete.

The meaning of appellees' assertion that appellant's case is "low priority", even if her classification of "low priority" is accepted as "undisputed", is nowhere splayed on the record. Is this low priority supposed to explain: (1) the tardiness in originally assigning the case (eight months); (2) the prolonged period of actual "investigation" (one year and five months); or (3) both of these periods of delay?

The district court found that this alleged "low priority" affects the assigning of the case initially (A. 56). If this is so, then the one year and five month lapse of time since then is clearly an abuse of authority as appellees have no reason for allowing an investigation to drag on for that long. In fact, appellees concede that from September 2, 1976 until May 26, 1977, they took no action with regard to this case (A. 13).

(footnote continued from preceding page) --

natural father from the preferences accorded by the "Act to the 'child' or 'parent' of a United States citizen or lawful permanent resident," at 1482, is not germane to the instant case. There, the attack was on the constitutionality of the statute itself, while here the attack is on the constitutionality of the statute as applied to appellant and her children.

If the alleged "low priority" is supposed to justify both periods of delay, it is still an unsatisfactory explanation as to why the whole process has taken in excess of two years when one or two phone calls could resolve the entire matter.

Small v. Kiley, Docket No. 76-6162, Slip Opinion, p. 2221 (2d Cir. Decided March 9, 1977), is instructive. There, plaintiff brought an action for a preliminary injunction to enjoin the INS from commencing deportation proceedings against her mother until plaintiff's naturalization application had been processed, because her mother could then claim immediate relative status. This Court vacated the preliminary injunction which had been granted by the District Court, citing as reasons therefor, inter alia, (1) there was no irreparable harm in that plaintiff's mother's deportation was not in any way imminent, and (2) plaintiff's likelihood of success on the merits was "doubtful" since she alleged only a three month delay after filing her naturalization application. (emphasis supplied).

By analogy, the instant case requires a finding in appellant's favor for the reason that the present case involves more than two years, eight times the delay of three months in Small. Appellant is not attacking a priority directive, but instead is specifically challenging the enforcement of the alleged "priority" as applied to her case, as well as the very existence of the so-called "low priority".

That the harm being suffered is irreparable is obvious. Each day that passes is a day that appellant and her children are needlessly separated, days that can never be recovered.

In Guinto v. Rosenberg, 446 F.2d 11 (9th Cir. 1971) and Carino v. INS, 460 F.2d 1341 (7th Cir. 1972), two other analogous cases, when faced with delays by the defendants, the courts stated that absent oppressive delay there is no reason to interfere in the administrative process. Being kept apart from her children for over two years is nothing if not "oppressive" to the appellant. Again, the delays in the cited cases were for far less time than in the present case.

(4) Appellees wrongly classified appellant's case.

Appellees classified appellant's case as one involving aliens not within the United States as opposed to one involving immigration benefits for an alien within the United States (A. 56). Appellant disputes the validity of this classification. As found by the Court below, appellees' duty in the instant case is to the appellant, not her children (A. 59-64). Furthermore, she, not the children, is the focus of the investigation. Consequently, her case should have been classified based on her status as an alien within the United States, not the status of her children. Moreover, appellees then assert that this alleged "lower priority" results because aliens outside the United States have no right to enter this country and therefore cannot suffer a substantial hardship if they are forced to wait additional time for the privilege of immigrating here. They glibly assert the Service is under no statutory or regulatory obligation to conduct investigations of this type. (A. 7).

That this explanation is inapplicable to the case at bar is patent and the district court so found. The court below found that the Service does have a duty to conduct investigations of this type (A. 59-64). Secondly, appellant's children are suffering substantial hardship by being forced to wait additional time to immigrate here as they are living in Taiwan without their father (deceased) or their mother. Finally, appellant's children do have a right to enter the United States if they meet the requirements of 8 U.S.C. § 1153(a)(2), as children of a permanent resident alien. This "investigation" is the only way to determine if they qualify. There are no other avenues open to them. Every day's delay is thus the sole cause for depriving them of their right to enter the United States and rejoining their mother.

- b. Appellees' delay is causing appellant great harm.

For two years now appellant has needlessly been prevented from seeing her three children. As the court in Pena v. Kissinger, 409 F.Supp. 1182 (S.D.N.Y. 1976), stated:

It takes no academic ingenuity to conclude that agency action [inaction in the case at bar] which separates wife from husband gives rise to perceptible injury. . . . It is no answer to say that defendants have not prevented the wife from travelling to Santo Domingo to join her husband for to do so she would be forced to sacrifice the opportunities and advantages offered by her adopted country, which has admitted her to lawful permanent residence. (at 1184).

That the harm being suffered in the instant case is great is beyond dispute. In light of the clear statutory purpose being frustrated and the nature of the relationship being severed as discussed earlier, the harm being inflicted is totally without justification.

Furthermore, plaintiff is being forced to live with uncertainty--will she or won't she be involved in revocation proceedings? See, Moore v. Arizona, 414 U.S. 25 (1974). That she should be forced to live with this hanging over her head for over two years is intolerable and should not be countenanced by this Court any longer. If the appellees are not forced to complete this investigation and report their findings, who knows how long this can go on.

B. The District Court Had the Authority to Compel the Appellees to Respond to the Consul in Taiwan.

1. This case does not Involve a Consular Officer's decision to grant or deny a visa.

It is irrelevant to the instant case that a court lacks jurisdiction to review a consular officer's decision to grant or deny a visa, Gomez v. Kissinger, 534 F.2d 518, 519 (2d Cir. 1976), U.S. cert. denied; Pena v. Kissinger, 409 F.Supp. 1182, 1186-1188 (S.D.N.Y. 1976). The issue in the instant case does not concern a decision by a consular officer; it concerns the lack of a decision by appellees. Surely then, this type of action, or more precisely inaction, is subject to the jurisdiction of the courts in that a writ of mandamus may be issued to compel the appellees to do what they are required by law to do--complete the investigation. 28 U.S.C. § 1361.

2. All the requisites necessary for a writ of mandamus are present.

28 U.S.C. § 1361 provides that the district court has jurisdiction over an action "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The courts have held that there are three elements that must co-exist in order for a writ of mandamus to issue: (1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the respondent to do the act in question; and (3) no other adequate remedy available. Lovallo v. Froehlke, 468 F.2d 340, 343 (2d Cir. 1972), cert. denied 411 U.S. 918 (1973).*

The district court properly ruled that it had the power to compel the defendants to respond to the Taiwan consul's inquiries, but incorrectly held that it did not have the authority to do so on the facts of this case (A. 64-65).

- a. Appellees have a duty to appellant to complete the investigation.

As found by the court below, "the statutory scheme and the regulations of INS relating to the revocation of preference petitions establish its duty to conduct the investigation. See, Feliciano v. Laird, 426 F.2d 424, 427-429 (2d Cir. 1970)." (A. 59-60).

* "Mandamus will not lie to compel a defendant to exercise discretion or judgment in a particular way." Martin v. Dunlop, 411 F.Supp. 519 (N.D.Cal. 1976).

The fact that a court must construe the statutory provisions which form the basis of the action is not a bar to the remedy of mandamus. Haneke v. Secretary of Health, Ed. and Welfare, 535 F.2d 1291, 1296, n. 16 (D.C. Cir. 1976).

- b. Appellant has no other adequate remedy available.

Appellant's only other remedy, besides waiting for an indeterminate amount of time for appellees to fulfill their duty, would be to go to Taiwan. That this is inadequate is obvious, but the court in Pena v. Kissinger, 409 F.Supp. 1182, 1184 (S.D.N.Y. 1976), even went so far as to articulate the absurdity of this so-called "remedy":

It is no answer to say that defendants have not prevented the wife from travelling to Santo Domingo to join her husband, for to do so she would be forced to sacrifice the opportunities and advantages offered by her adopted country, which has admitted her to lawful permanent residence.

- c. Appellant does not seek to compel appellees to decide in a specified manner.

Appellant is merely trying to elicit a response--any response--from the appellees. Appellees may have broad discretion in the granting or denying of a preference visa,* but they do not have the authority to make no decision at all. To allow that would

* See, e.g., Mamengo v. I.N.S., 446 F.2d 51 (9th Cir. 1971); McLat v. Longo, 412 F.Supp. 1021 (D.C. Virgin Islands 1976); Nazareno v. Attorney General of U.S., 366 F.Supp. 1219 (D.C.D.C. 1973), aff'd. 512 F.2d 936, cert. den. 423 U.S. 832 (1973).

leave the appellant in an "administrative limbo" and virtually deny her the "right to appeal bestowed by 8 C.F.R. § 205.3." (A. 61-62).

d. Appellant is entitled to the relief sought.

The district court, after carefully and painstakingly finding a duty on the part of appellees to conduct the investigation, then summarily dismissed appellant's case for the reason that the "INS has not abused its discretion or acted arbitrarily, unreasonably or illegally. . . ." (A. 64-65) (emphasis supplied).

In Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970), this Court held:

"When a clear-cut duty imposed by regulation is not performed, mandamus will issue to compel the federal officer to fulfill his obligation. 28 U.S.C. § 1361, at 429."

Decisions construing § 1361 have held that "official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted." United States ex rel. Schonbrun v. Commanding Officer, Armed Forces, 403 F.2d 371, 374 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969). See also, Lovallo v. Froehlke, 468 F.2d 340, 346 (2d Cir. 1972) cert. denied 411 U.S. 918 (1967); Nixon v. Secretary of the Navy, 422 F.2d 934, 939 (2d Cir. 1970).

Traditional teaching views a writ of mandamus as appropriate solely "to compel officials to comply with the law when no judgment [or discretion] is involved in that compliance." Note, Developments in the Law: Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 849 (1957). Thus, a writ of mandamus properly is issued with

a specific statutory or regulatory direction. See, e.g., Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970) (Army failed to process application for hardship discharge in accordance with regulations); Leonhard v. Mitchell, 473 F.2d 709, 712-713 (2d Cir. 1973), cert. den. subnom. Leonhard v. Richardson, 412 U.S. 949 (1973).

Appellant contends that she is entitled to a writ of mandamus under either one, or both, of the aforesaid categories.

First, it is appellant's contention that although defendants say they are investigating, the lapse of over two years demonstrates that no investigation is taking place. In Haidar v. Coomey, 401 F.Supp. 717 (D.Mass. 1974) app. den. 530 F.2d 962 (1st Cir. 1976), the court was faced with a case similar to the instant case. An alien had brought an action against the District Director of the INS for "mandamus to require immediate adjudication of an 'immediate relatives' status." (at 719). The court held that "[m]andamus would. . .be appropriate. . .if the INS had refused to adjudicate the petition at all. . . ." Id. at 720. In the instant case, taking over two years to complete a simple investigation, and thereby depriving a mother and her three children of each other's companionship, is tantamount to refusing to investigate at all, and therefore, a writ of mandamus is appropriate.

Second, appellant is entitled to the relief sought for the reason that the appellees' conduct has exceeded any rational exercise of discretion, even if it is within the alleged authority given by a "low priority" rule whose very existence is vehemently denied by appellant, and which itself is a genuine issue of fact.

In Lovallo v. Froehlke, supra, appellant, a serviceman who was ordered to return to active duty after his enlistment had expired brought a petition for mandamus to enjoin the order on the ground that his enlistment had expired three months earlier. The court denied appellant's request on the ground that the delay of three months was not a gross abuse of discretion. However, the court does point out, as an extreme example, that a delay of years would have warranted granting appellant's request for a writ of mandamus. By contrast, in the instant case the delay is in excess of two years, not three months, and justifies a writ of mandamus.

The district court found a duty here (A. 59-64). Mandamus is thus proper and required in order to compel defendants to carry out their duty.

C. District Court Erred in Granting Summary Judgment To Appellees As Material Facts Are In Dispute.

Appellees made a motion to dismiss which the court, treating it as a motion for summary judgment, granted. (A. 53)

The granting of summary judgment is proper only when "there is no genuine issue as to any material fact and. . .the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c).

In the oft-cited case of Poller v. Columbia Broadcasting System, 368 U.S. 464, 468 (1962), the Court, in construing Rule 56(c), stated:

This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . .[and where] no genuine issue

remains for trial. . .[for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627, 88 L.Ed. 967, 972, 645 S.Ct. 724 (1944).

Applying the above standard to the facts of the case at bar clearly shows that the appellees did not meet their burden and that the district court erred in granting them summary judgment.

1. Appellant disputes the existence of the alleged "low priority" status.

Astoundingly, the lower court found a key fact in dispute and nonetheless granted appellee's summary judgment. The Court stated that "Defendant [INS] purportedly assigns lower priority" (A. 66) to appellant's type of case! If it is only "purported", summary judgment should obviously have been precluded, a priori. It is only secondary in light of this startling misapprehension by the lower court that the affidavit of an employee of a regional office's fraud unit of two years' tenure is equated with the "INS".

- a. The requirements of Rule 56 of the Federal Rules of Civil Procedure have been ignored.

Rule 56 specifically states that ". . .affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), Federal Rules of Civil Procedure. (emphasis supplied)

Appellees have offered no proof of the existence of the alleged directive which "purportedly" places appellant's case in the ambiguous "low priority" status. The wholly inadmissible statement in the affidavit of a low level employee, who freely admits that she has no involvement at all in any policy decisions (A. 4-8) prompted even the judge to dub the "low priority" a "purported" status. (A. 66) The employee uses this very lack of responsibility for policy formulation to support her credentials as an investigator (A. 5-6), while at the same time she admits that she has little experience with the type of investigation involved in the instant case (A. 7).*

That the affidavit is entirely inadmissible as competent evidence of the existence of the alleged priority directive is clear. The affiant admits that her duties do not include policy decisions (A. 4-8), and as such her statements in her affidavit concerning the existence of this alleged priority directive are plainly self-serving and unsubstantiated hearsay. See, Rule 801, Federal Rules of Evidence.

In Barber v. Tadayasu Abo, 186 F.2d 775, 777 (9th Cir. 1951), cert. den. 342 U.S. 832 (1951), the court held that attaching two unverified statements of Japanese statutes to an affidavit did not make the statutes admissible. They were still hearsay and a "certificate of the lawful custodian of the statutes of Japan" was necessary.

* This affiant started her new job with appellees just one month before appellees received the request to investigate appellant's case (A. 6 and A. 8).

Id. The instant case is far more aggravated. Here, not even a copy of the alleged "priority directive" is before the Court! All that exists is an incompetent, unverified, inadmissible bit of hearsay by a low level employee who has no responsibility whatsoever for making any policy decisions and no established competency to even discuss such policy decisions or even purport to familiarity with them.

Summary judgment for appellees was wholly improper on the ground alone that the priority status of appellant was not only in dispute, but virtually a crucial area of inquiry represented by a void in the record.

b. Nowhere on the record is there a definition of "low priority".

While appellees, and the judge below, relied on this elusive low priority status to explain away appellees' abuses in the instant case, the term is nowhere defined by anyone.

Simply stating that appellant's case is a lower priority than cases involving applications for immigration benefits submitted on behalf of aliens within the United States, the only nebulous inference possible from an affidavit containing no definition of the "low priority", is meaningless and vague. Whether this means that appellant's case has a second priority status or a one hundredth priority status is nowhere explained.

Moreover, what the effect of this lower status is is also not disclosed. Does it mean that every case with a higher priority will get investigated before it does? Does it mean that appellant's

case has a five year time limit? Based on the record of this case, it is impossible to divine the meaning of this relative term, and summary judgment was therefore clearly improperly granted.

- c. The willful delays by Investigator Diane M. Weisheit raise a clear inference of bad faith which the district court totally ignored.

In paragraphs 10, 11 and 12 of her affidavit (A. 8-9), the affiant candidly admits that upon receiving appellant's case in May, 1976, and reviewing same, she knew exactly what had to be done with regard to the investigation. She then admits doing nothing during the whole month of July, 1976. (A. 10). In fact, she finally did proceed only at the instance of a telephone call by appellant's attorney on August 5, 1976 (A. 10).

Affiant next concedes that she was the person who terminated the interview she had with appellant on August 25, 1976. (A. 12). In view of appellees' duty to investigate this case, this is clearly abusive conduct, whether or not a "low priority" exists and whether or not appellant's case was of a "low priority" status, both of which are disputed by appellant.

The employee then evidences bad faith by stating that the day after she terminated the interview, appellant instituted this action (i.e., on August 26, 1976), and that from September 2, 1976, until May 26, 1977, no action was taken by appellees with regard to appellant's case. The inference is obvious that the affiant, new at her job as investigator, was upset at this action being taken in one

of her cases and therefore willfully neglected to proceed with her investigation for eight months.

The affiant's frail attempt to conceal her inactivity is plain. She attempts to persuade the Court into believing she was constantly working on the case by stating, "For example, on September 2, 1976, I interviewed. . ." (A. 13). However, in view of the fact that affiant throughout her affidavit so carefully delineates each and every action taken by her, it is respectfully submitted that the action taken on September 2, 1976, was the only action taken by the affiant for nine months, and the "For example" preface was an attempt to mislead the Court.

That this bad faith on the part of the investigator is relevant is clear. As the Supreme Court has stated, Due Process requires, at a minimum: ". . . a 'neutral and detached' hearing body. . . ." Morrissey v. Brewer, 408 U.S. 471, 489 (1971). See also, Gagnon v. Scarpelli, 411 U.S. 778 (1972). The investigator's bad faith, therefore, deprived appellant of her Due Process rights, as the role of the affidavit in question was cast as being virtually dispositive of the merits of the present claim.

The premature granting of summary judgment, which cut off appellant's right to explore this possible constitutional deprivation, was consequently improper.

Moreover, in view of this questionable conduct by the affiant, she nonetheless states, ". . . the current posture of this

action seems incredible to [her]." (A. 15). "Incredible" is certainly the appropriate word, for how else can appellees' action, which is keeping a mother and her three children from being reunited, be described? Unfortunately, the appellant does not even consider the harsh consequences of her delay in her affidavit. That, it seems, is what is truly incredible.

2. Dispute exists as to the proper classification of appellant's case.

Appellees' justification for the length of time it has taken to conduct the investigation is that seeking to reunite appellant with her children was a "low priority" status (A. 56). Appellant, as discussed earlier (see, IV.A.2.a.(4), supra), disputes this classification of her case, again rendering a genuine issue of fact swept under the rug by premature summary judgment.

As has been demonstrated earlier, appellees' classification was in error. However, the district court, without even allowing appellant to dispute the propriety of this classification, accepted it as bona fide and granted appellees summary judgment!

That the correctness of the classification is material is obvious, for without the alleged "low priority" designation, appellees have no justification for their intolerable delay in processing appellant's case.

Therefore, for the district court to grant appellees summary judgment without allowing appellant to dispute this erroneous designation of her case, was error.

3. Other factual issues in dispute could not be determined on the sparse record before the district court judge.

Even if the alleged "low priority" designation of appellant's case was correct, there were other material factual issues in dispute which could not be, and should not have been, decided on the few facts before the district court judge. It was not "quite clear what the truth [was]. . . ." Poller v. Columbia Broadcasting System, supra.

- a. Dispute exists as to whether or not appellant made misrepresentation in obtaining her permanent resident alien status.

The sole reason that immigration visas have not been issued to appellant's three children is appellees' misapprehension that appellant committed fraud in procuring her permanent resident alien status by misrepresenting her former employment in Taiwan (A. 55-56). Without this unverified and unjust allegation of "fraud", appellees' action (or more precisely inaction) would be without a thread of justification. Therefore, the presence or absence of misrepresentations by appellant is as material as any fact could possibly be in ruling on appellees' motion.

Appellant vehemently denies that she committed any fraud and has presented evidence in support of her claim. (A. 29-52). Appellees, on the other hand, after two years of investigating, have no credible evidence to support their claim of "fraud" being committed by appellant.

As previously stated, without the existence of this alleged "fraud" appellees have absolutely no reason for failing to respond to the inquiries of the Taiwan consul. Even assuming that there is some basis for this allegation of fraud, appellees' two year delay is still wrongful. In either case, a trial is necessary in order to ascertain whether this alleged fraud actually occurred, or, at least, whether there is a basis for thinking that it might have occurred.

Granting appellees summary judgment was thus error.

- b. Dispute exists as to who caused the delays in the investigation.

Appellees assert that appellant is responsible for the delays in the investigation due to her alleged failure to cooperate with them (A. 56). Once again, appellant categorically denies this allegation and blames appellees for the incredible length of time that this so-called investigation has lasted (A. 29-52). Appellees admit that they terminated the interview with appellant on August 25, 1976 (A. 12 and A. 31). It is also undisputed that they alone were responsible for the eight month lapse of time before appellant's case was even assigned for investigation (A. 8 and A. 56). It is also undisputed that they failed to take any action on appellant's case from September 2, 1976 until May 27, 1977 (A. 13).

In view of the aforesaid facts, it is obvious that this fact, i.e., who is responsible for the delay, is in dispute. That this fact is material to appellees' motion for summary judgment is equally as obvious. The propriety of appellees' conduct is dependent

upon who is to blame for the investigation dragging on for over two years.

- c. Dispute exists as to whether appellees informed appellant of the reason for the interview of August 25, 1976.

Appellees assert that appellant was informed that the reason for the interview was to inquire about her work experience in Taiwan and the United States, as there was information indicating that she had fraudulently acquired her permanent residence status (A. 10). Appellant vehemently denies this (A. 33). That this is a material fact is clear. In addition, it is further evidence of the bad faith of appellees. Moreover, appellees never even told appellant what the alleged evidence of fraud was (A. 35).

- d. Dispute exists as to statements of appellant at the interview on August 25, 1976.

Appellees assert that appellant stated she worked at Kwok-Kong Restaurant for "over a year". (A. 11). Appellant again denies this, as she worked at said restaurant for over six years (A. 35). Materiality is evident in that this is the sole basis for this action--whether appellant misrepresented her former employment in Taiwan.

- e. Dispute exists as to the reason for terminating the interview of August 25, 1976.

Appellees admit that they terminated the aforesaid interview (A. 12 and A. 56). However, they allege that appellant's attorney was the cause of the termination (A. 12 and A. 56). Appellant agrees with appellees that they were responsible for ending the

interview, but denies any wrongdoing on the part of appellant's attorney (A. 37).

This is a material fact, for the obvious reason that it bears directly on the length of time of the investigation in the instant case and on the bad faith of appellees.

4. The instant case is distinguishable from other cases where summary judgment was granted.

Summary judgment has been granted in an action for judicial review of a denial of a preference visa in Tang v. District Director of U.S. INS, 298 F.Supp. 413 (C.D. Cal. 1969), aff'd. 433 F.2d 1311 (9th Cir. 1970), and a denial of a change of non-immigration status in Chong Shik Ahn v. District Director of U.S. I.N.S., 418 F.2d 910 (9th Cir. 1969). However, the instant case presents a record vastly different from the records in these two cases.

First, in the two cited cases the defendants had made final decisions. In Tang, the decision was that plaintiff had not shown the equivalent of a degree in electronic engineering from an accredited institution (at pp. 416-417). In Ahn, defendant had decided that plaintiff had not set forth documentary evidence sufficiently establishing financial resources capable of supporting him (at p. 911).

In contrast to these two cases, the gravamen of the instant case is the lack of any decision by appellees. Second, in the cited cases the courts had before them undisputed facts on which they based

their orders granting summary judgment. In both cases plaintiffs had presented their evidence and a trial would have been superfluous. Again, the instant case is distinguishable in that many of the facts are in dispute. (See, e.g., IV.C.,1.,2. and 3, supra). A trial is necessary in order to resolve these controversies.

The district court thus erred in granting summary judgment to appellees.

V. CONCLUSION

For the aforesaid reasons the district court's order granting appellees summary judgment should be vacated and an order granting appellant summary judgment and ordering appellees to finish their investigation should be entered.

Dated: New York, New York
October 14, 1977

Respectfully submitted,

LAW OFFICES OF DAVID C. BUXBAUM, P.C.
Attorneys for Appellant
11 Broadway, Suite 1612
New York, New York 10004
(212) 425-4347

Of Counsel:

David C. Buxbaum

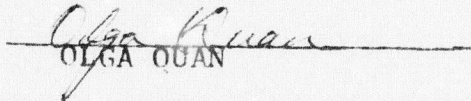
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

OLGA QUAN, being duly sworn, deposes and says:

1. Deponent is not a party to the within action, is over 18 years of age, and resides at 27 East 37th Street, New York, New York.

2. On October 14, 1977, deponent served the within Brief of Appellant Wan Shih Hsieh and Appendix to Appellant's Brief upon Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, attorney for the appellees in this action, at One St. Andrew's Plaza Annex, New York, New York 10007, Attention Robert S. Groban, Jr., Esq., the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


OLGA QUAN

Sworn to before me this
14th day of October, 1977.



PAMELA M. OWEN
NOTARY PUBLIC, State of New York
No. 24-426837
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

